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89-384

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PHILIP J. BROWN, *et al.*,

Petitioner,

v.

1250 TWENTY-FOURTH STREET ASSOCIATES, LIMITED PARTNERSHIP, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Philip J. Brown, *pro se*
2613 P Street, N.W.
Washington, D.C. 20007

WILLIAM J. BROWN (PRO SE)
2613 P Street, N.W.
Washington D.C. 20016

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the District of Columbia Circuit erroneously denied the Petitioners due process right to seek disqualification of a judge based on appearance of conflict of interest when in possession of evidence indicating the evidence of the appearance of conflict of interest.

2. Whether the United States Court of Appeals for the District of Columbia Circuit denial of Petitioners request to vacate orders and recall mandate violated the doctrines established in *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194.

LIST OF INTERESTED PERSONS

The parties to the proceeding below were the petitioners, Philip J. Brown, William J. Brown and B&W Management, Inc., and respondents, 1250 Twenty-Fourth Street Associates Limited Partnership and Joseph W. Kaempfer, Jr. American Security Bank, N.A. was an intervenor in support of respondents. John W. Guinee, Jr., Bankruptcy Trustee for Philip J. Brown, William J. Brown and B&W Management, Inc., was a defendant in the proceeding before the district court. Other interested persons are: Charles A. Kubinski, Esquire, counsel for petitioners; John Waites, United States Trustee; Richard O. Duvall of Dunnells, Duvall, Bennett & Porter, counsel for respondents; David Kuney, Esquire of David & Hagner, counsel for American Security Bank, and; Peter Kolker of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, counsel for the Bankruptcy Trustee John W. Guinee, Jr.

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1250 TWENTY-FOURTH STREET ASSOCIATES, LIMITED PARTNERSHIP

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Philip J. Brown and William J. Brown (collectively referred to as "Petitioners"), respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on June 9, 1989.

OPINIONS BELOW

The Memorandum Order of the United States District Court for the District of Columbia (Pratt, J.), entered November 18, 1987, has not been reported. It is reprinted in the Appendix hereto, pages 6a-12a, *infra*.

The Order of the United States Court of Appeals for the District of Columbia Circuit, entered June 28, 1988, has not been reported. It is reprinted in the Appendix hereto, page 13a, *infra*.

The Order of the United States Appeals Court for the District of Columbia Circuit, entered April 5, 1989 has not been reported. It is reprinted in the Appendix hereto, pages 3a-4a.

The Order of the United States Appeals Court for the District of Columbia Circuit, entered June 9, 1989 has not been reported. It is reprinted in the Appendix hereto, page 1a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Appeals Court for the District of Columbia Circuit is invoked under Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowlede of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or

the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controvesy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or if a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section, the following words or phrases shall have the meaning indicated:

(1) ''proceeding'' includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) ''fiduciary'' includes such relationships as executor, administrator, trustee, and guardian;

(4) ''financial interest'' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a ''financial interest'' in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a ''financial interest'' in securities held by the organization;

(iii) The proprietary interest of a policy-holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a ''financial interest'' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a ''financial interest'' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualifica-

tion enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

STATEMENT OF THE CASE

In late 1981, Petitioners filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Columbia. In July, 1982, the bankruptcy court appointed a Trustee to manage debtors' property.

In November, 1983, the Trustee filed an amended plan of arrangement. The centerpiece of this plan was a set of agreements between the Kaempfer Company, as lessee, and the Petitioners, as landlord, for a ninety-nine year ground lease for valuable real estate located in Washington, D.C. As part of the transaction arranged pursuant to the Trustee's plan, the parties purportedly executed a first amendment to the ground lease on December 23, 1983.

In January, 1984, the bankruptcy court confirmed the Trustee's amended plan of arrangement and authorized and directed the Trustee to execute the necessary agreements, including the ground lease as amended. On October 11, 1984 the Trustee purportedly executed, ratified and confirmed the ground lease and amendments thereto, including the first amendment. Thereafter, construction of a commercial building on Petitioners' property began.

In January, 1986, disputes arose between the Petitioners and the Respondents concerning the calculation of rent, costs and other matters under the terms of the lease arrangement. Respondents 1250 Twenty-Fourth Street Associates Limited Partnership, assignee of the lease, and Joseph Kaempfer

brought an adversarial action in the bankruptcy court seeking confirmation of their calculation of rent and other matters concerning the lease. Petitioners counterclaimed that respondents had defrauded them out of the full amount of rent due for the property and that Respondents had failed to comply with their agreements. Petitioners' counterclaim for damages, together with a jury demand, prompted the bankruptcy court to refer the adversarial litigation to the United States District Court for the District of Columbia.

The primary issue before the district court concerned the appropriate calculation of rent under the ground lease. Petitioners contended that during the negotiations of the lease, it was clear they would be paid on the basis of each and every square foot of commercial space built and leased anywhere in the building. Respondents countered that the explicit terms of the first amendment to the ground lease limited the calculation of rental payment to the commercial floor area ratio.

On the basis of the explicit language of the first amendment to the ground lease ("first amendment"), the district court held that the terms governing the calculation of annual rent were clear and unambiguous and, therefore, granted Respondents' motion for summary judgment. The district court found that the initials of Petitioners Philip and William Brown on each page of the first amendment, as well as the signature of Philip Brown, indicated that Petitioners had read the contract. The district court reasoned that, having read the contract, Petitioners could not now rely on Respondents' purported representations as to what the contract provided.

Petitioners appealed the lower court's grant of summary judgment in favor of the Respondents to the United States Court of Appeals for the District of Columbia Circuit. In December, 1986 the court granted summary affirmance to the Respondents. The court of appeals found that the district court

properly held that the first amendment to the lease ambiguously employed the term "floor area ratio" and that in light of the unambiguous language of the lease, the district court was compelled to refuse to consider extrinsic evidence of the parties' intent. The Petitioners filed a petition for reconsideration of the court of appeals decision. The court of appeals denied the petition without prejudice to the Petitioners' right to move in the district court for relief of judgment on the ground of newly discovered evidence pursuant to Fed.R.Civ.P 60(b).

Based upon these reports of Petitioners' document experts and, in conformity with the court of appeals' February 17, 1987 order, Petitioners filed, in the district court a motion for relief from judgment, pursuant to Fed.R.Civ.P. 60(b).

By memorandum order dated November 18, 1987, the United States District Court for the District of Columbia (Pratt, J.) denied Petitioners' motion for relief from judgment on the primary grounds that: (1) Petitioners' evidence of forgery was not, as a matter of law, "newly discovered evidence" within the meaning of Rule 60(b). Further, the Petitioners failed to exercise due diligence in their discovery of the alleged forgery, and (2) the Petitioners failed to file their motion for relief from judgment within a reasonable time.

Petitioners appealed the district court's decision to the District of Columbia Circuit. Respondents, by motion, sought summary affirmance of the district court order. In response, Petitioners made the following points:

(1) Petitioners did not have copies of the ground lease or the first amendment in their position until Respondents produced these documents at the time they moved for summary judgment before the district court. After the district court granted summary judgment and its order was affirmed by the court of appeals, Philip Brown discovered the discrepancy with

respect to his signature. After this discovery, Petitioners sought expert opinions from document examiners before raising this matter to the attention of the court. Once these examiners provided evidence that Philip Brown's name had been forged, Petitioners did act to bring this evidence of forgery before the court.

(2) Petitioners filed their motion for relief from judgment within the one year limitation set forth in Fed.R.Civ.P. 60(b) and in a reasonable time after the document experts provided evidence of the forgery.

By order entered June 28, 1988, the court of appeals summarily affirmed the lower court's denial of Respondents' Motion for Relief from Judgment. The circuit court's order did not address the arguments raised by Petitioners, but simply affirmed the district court's decision for substantially the same reasons as set forth in that court's memorandum order.

Petitioners challenged Judge Wald's participation on this panel because of an appearance of impropriety and/or conflict of interest arising from her husband's investment in a California limited partnership.

Judge Wald's husband is Robert L. Wald, who was named partner of the former firm Wald, Harkrader & Ross ("WH&R") and currently a partner in Pepper, Hamilton & Scheetz.

According to Chief Judge Wald's Financial Disclosure Report ("FDR") dated May 15, 1988, her husband has a limited partnership interest in O.P./West L.A. Associates located at 1500 W. Olympic Boulevard in Los Angeles.

Relying on the information in Chief Judge Wald's FDR, the Petitioners checked with the Secretary of State of California and found that on June 12, 1985, a Certificate of Limited Partnership was filed by WH&R for O.P. Building Limited Part-

nership. The name of the partnership was changed to O.P./ West L.A. Associates ("O.P.") March 20, 1986.

One of the general partners of O.P. was Anne Pallie, who was formerly a subtenant, in WH&R's office at 1300 19th Street, N.W., Washington, D.C., and client of WH&R.

The business of O.P., as stated, was to own, operate and deal with real property and improvements known as 11500 West Olympic Boulevard, Los Angeles.

On April 2, 1986, an Amendment to the Certificate of Limited Partnership was filed where John H. Naisbitt was made a limited partner as of October 31, 1985. Signing for Mr. Naisbitt and making handwritten changes to the filed papers[1] was Peter Kolker, a Washington, D.C. attorney with the firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker and the attorney for the bankruptcy Trustee in the underlying bankruptcy proceedings, John Guinee, as Naisbitt's attorney-in-fact. Mr. Naisbitt secured a $150,000 partnership interest with a small deposit of $5,000 and a note for the balance.

A subsequent filing, signed on December 18, 1985, indicated Mr. Naisbitt's withdrawal from the partnership and once again was signed by Peter Kolker as attorney-in-fact. The records do not show why Mr. Naisbitt turned over his substantial interest in a little more than a six-week period.

On December 31, 1985, Mr. Wald entered the partnership with a capital contribution of $20,000. Mr. Wald's contribution, combined with those of the other new partners of that date, approximated the $150,000 withdrawn by Mr. Naisbitt.

---

[1]Kolker added to the Third Amendment and Restatement to the Partnership Agreement a clause which exempted only Mr. Naisbitt from the strict penalties for default on capital contribution penalties applicable to *all* the other partners. See attached Exhibit 2.

Chief Judge Wald did not report this transaction on her 1985 F.D.R., filed May 15, 1986.

Chief Judge Wald, on page 1 of her 1986 F.D.R., filed May 15, 1987, reported that her husband purchased an interest in O.P. for between $15,000 and $50,000. According to the limited partnership papers filed with the State of California, the capital contribution was $20,000.

On page 4 of the same F.D.R., Chief Judge Wald estimated the value of the O.P. partnership interest at between $50,000 and $100,000.

In a statement attached to the Order of this Court dated April 5, 1989, Chief Judge Wald asserts that: neither she nor her husbnd knew of the involvement and participation of Mr. Kolker or Mr. Naisbitt, Mr. Wald's purchase of the O.P. interest resulted from a private placement offering, and that the original purchase, on December 31, 1985, was not subject to disclosure under the Financial Disclosure Instructions.

On her most recent FDR, Chief Judge Wald reports that the O.P. interest was sold and that her husband realized a capital gain of over $100,000.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ERRONEOUSLY DENIED THE PETITIONERS DUE PROCESS RIGHT TO AN IMPARTIAL JUDICIARY AND THEIR RIGHT TO SEEK DISQUALIFICATION OF A JUDGE BASED ON APPEARANCE OF CONFLICT OF INTEREST WHEN IN POSSESSION OF EVIDENCE INDICATING THE EVIDENCE OF THE APPEARANCE OF CONFLICT OF INTEREST.

The Supreme Court in the case of *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (1988) established the standards for recusal of a judge.

It is conceded that the petitioner, a seasoned litigant and a citizen concerned about ethical standards, protested his rights regarding conflicts of interests among parties and judges. He readily admits that he has often inquired of potential conflicts of interests between parties, attorneys, and judges. However, his requests have been either founded in fact or founded in a good faith belief that either a conflict of interest or an impropriety exists. Numerous recusals have taken place either in the District Court and Court of Appeals. A threshold question before this Court is that can the fact that the Browns raise an issue of conflict of interest as they did below be used against them and their attorneys by the court. The Court of Appeals seems to think so for in their opinion it stated "in view of appellants frequent use of this tactic, further inquiry is apprpriate," and went on to refer the matter to the Disciplinary Board. Are the Browns entitled to raise a constitutionally mandated challenge? The court called the pleading frivolous and irresponsible but offered no reson for these comments. The record below shows that the pleading is neither, but is based on facts.

The heart in the *Liljeberg* case as this court stated is the perception of justice, the court in its order mentioned specifically the risk of undermining the public's confidence in the judicial process. It is the Petitioner's belief that the public's confidence in the administration of justice would be undermined here. The Chief Judge of the Circuit Court and her husband did business with an attorney representing an adverse party. The judge's husband, and in turn the Judge herself, should have recognized the name of Mr. Kolker and the appearances created by the partnership.

A. The Petitioners Are Entitled To Seek Disqualification Of A Federal Judge Based On Appearance Of Conflict Of Interest When In Possession Of Evidence Indicating The Evidence Of The Appearance Of Conflict Of Interest.

The integrity of the judiciary has been vigorously promoted by recent decisions of this Court. The participation of a judge in a matter in which he has a financial interest has been found to be a violation of the Due Process rights of the parties appearing before that judge. *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986). The United States Congress has passed statutes which seek to ensure that such Due Process violations will not occur, including the Ethics in Government Act of 1978. In a footnote in the case *Liljeberg v. Health Services Acqusition Corp.*, 108 S.Ct. 2194 (1988), the doctrine expressed in *Aetna* was restated when Justice Stephens wrote: "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias.' " *Liljeberg* at 2205, n. 12.

United States Code Title 28 Section 455(a) requires recusal in cases where a judge's "impartiality *might reasonably* be questioned," not by attorneys, judges or professors, but by the average, reasonable person. *Liljeberg* at 2204-05.

Section 455(a) intentionally omitted scienter as a requisite for recusal. *Liljeberg* at 2202. Actual knowledge is not a requisite for recusal under Section 455. *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2202 (1988).

In another footnote in *Liljeberg*, this Court recognized that review of a judge's financial disclosure for was an unusual step for a litigant to take, but that even such a high degree of diligence may not reveal conflicts of interest which judges may have. *Liljeberg* at 2205, n. 11.

Petitioners have taken the unusual step of reviewing the financial disclosure forms and gone even further by examining the investments and holdings of other judges before whom they have appeared or will appear. They believe strongly in protecting their right to an impartial judiciary and seek nothing more than what the Constitution and laws of the United States guarantee. They have not created any of the circumstances from which the appearance of conflict of interest arose in this case, and should not be unjustly deprived of their right to impartial justice.

B. The Petitioners Presented Sufficient Evidence To Require Disqualification Of Chief Judge Wald.

When viewed under this standard, the details of the relationship among the Walds, Mr. Naisbitt and Mr. Kolker in the O.P. partnership create the appearance of impropriety and/or conflict, sufficient to require disqualification.

When Mr. Wald first entered the O.P. partnershp on December 31, 1985, he agreed to "be bound AMENDMENT NUMBER THREE TO THE THIRD AMENDMENT [of the Partnership] and all previous amendments thereto." The previous filings of the partnership are replete with Mr.

Naisbitt's name and Mr. Kolker's name when signing, as attorney-in-fact, each filing to which Mr. Naisbitt was a party. Mr. Kolker, in his own handwriting, also materially altered one of the terms of the partnership agreement.

These facts alone would indicate that Mr. Wald, a respected attorney, would know of Mr. Kolker and Mr. Naisbitt's role in the partnership simply by reading the materials to which he agreed to be bound. Mr. Kolker's handwritten change, the only one of its kind in the entirety of papers filed prior to his entry into the partnership, would, in the mind of an objective, reasonable mind, certainly draw the attention of a trained legal eye. The special status conferred to Mr. Naisbitt by the change, again in the mind of an objective observer, makes unreasonable Chief Judge Wald's claim that neither she nor her husband knew of Mr. Naisbitt and Mr. Kolker's involvement.

The nature of the offering also lends credence to the belief that Mr. Wald would know. Chief Judge Wald herself characterized the partnership as a "private placement offering," that was made by Anne Pallie, a former subtenant and client of Wald, Harkrader & Ross. Only a handful of individuals were involved in the partnership prior to Mr. Wald's entry, indicating that the term "private" was used accurately. With the small number of partners involved, it is illogical and improbable that Mr. Wald would not or did not know of Naisbitt or Kolker.

As to the question of sale or transfer of a percentage of Mr. Naisbitt's interest to Mr. Wald, directly or indirectly, the O.P. papers filed in California show the following: on December 18, 1985, Naisbitt withdrew a $150,000 commitment to O.P. and that thirteen days later, December 31, Robert Wald and others were admitted to the partnership for a combined capital contribution of $152,327. Once again, an analysis that utilizes the objective reasonable person standard, and recognizes the at-

tending public skepticism acknowledged by *Liljeberg*, could easily conclude that Mr. Wald directly or indirectly purchased a piece of Naisbitt's interest. Since the interest was valued by Chief Judge Wald at $50,000-$100,000 and her husband eventually realized a capital gain of over $100,000, the objective observer *could* reasonably draw negative conclusions about the judiciary, from the totality of the facts outlined above and the potential for favoritism arising from the potential, or actual, profit in this investment.

[another significant Supreme Court decision in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).] The decisions of the Supreme Court in *Liljeberg* and *Aetna* have changed the approach to conflict of interest and appearance of impropriety issues.

The *Aetna* court decided that a 5-4 ruling of the Alabama Supreme Court had to be vacated due to the fact that the author of the opinion had to be disqualified retroactively for a conflict of interest. The Court stated:

> Because of Judge Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Aetna at 828.

Justice Brennan filed a concurring opinion in *Aetna* and he argued that the leading role facet of the decision to vacate was "irrelevant." The decision of the Alabama Supreme Court was invalid simply because Judge Embry participated, not because he cast the deciding vote or wrote the opinion. *Aetna* at 830-31. The deliberative process engenders subtle forms of influence and the improper participation of one judge in the process "necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process." *Aetna* at 831. A

second concurrence written by Justice Blackmun further stressed the point that Judge Embry's mere participation, rather than his leading role, deciding vote or authorship of the opinion, caused the decision to be unconstitutional:

> The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues. The remaining events — that another justice switched his vote and that Justice Embry wrote the court's opinion — illustrate, but do not create, the constitutional infirmity that requires us to vacate the judgment of the Alabama Supreme Court.

Aetna at 833.

C. The Order of June 9, 1989 Unjustly Deprives Petitioners Of Their Due Process Rights.

The denial of the Petitioners request for disqualification of Chief Judge Wald and the vacatur of the Order of June 28, 1988 served, as stated above, to deprive the Petitioners of their due process. Furthermore, the decision of the members of the District of Columbia Circuit to refer Petitioners counsel for disciplinary action compounded the injustice by effectively denying the Petitioners the ability to exercise their right to counsel.

The Petitioners have been forced, as a result of these referrals , to continue quest for protection of their rights in a *pro se* manner. Attempts to secure counsel for this petition were thwarted when the attorneys approached by the Petitioners were informed of the fate of Petitioners' counsel below.

Instead of upholding the doctrines of *Liljeberg* and ensuring an impartial judiciary for those parties before the District of Columbia Circuit, the Order of June 9, 1989 clearly signals that those who invoke the *Liljeberg* doctrine must beware of strong reprisals from that court. The actions of the judges of the District of Columbia Circuit have caused a chill wind to pass across the realm of judicial impartiality championed by *Lilejberg* and sets a dangerous precedent for the future of ethics in this Circuit.

II. THE DENIALS OF PETITIONERS' REQUEST TO VACATE ORDERS AND RECALL MANDATE VIOLATED THE DOCTRINES ESTABLISHED IN *LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.*, 108 S.CT. 2194.

The Order issued on June 9, 1989 is inconsistent with the recent Supreme Court rulings in *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (1988) and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). The Order also fails to adhere to 28 U.S.C. Section 455(a) which governs disqualification of judges. The Appellants seek the protection of their due process rights provided by the Constitution and governing case and statutory law.

A. The United States Court Of Appeals For The District Of Columbia Circuit Violated The Doctrines Established In *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194.

In the landmark case on judicial recusal and vacatur, *Liljeberg*, 108 S. Ct. 2194, the Court found that:

> Scienter is not an element of a violation of §455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. To read §455(a) to provide that the judge must know

> of the disqualifying facts, requires not simply ignoring the language of the provision — which makes no mention of knowledge — but further requires concluding that the language in subsection (b)(4) — which expressly provides that the judge must ***know*** of his or her interest — is extraneous. A careful reading of the respective subsections makes clear that Congress intended to require knowledge under subsection (b)(4) and not to require knowledge under subsection (a). Moreover, advancement of the purpose of the provision — to promote public confidence in the integrity of the judicial process, see S.Rep. No. 93-419, p. 5 (1973); H.R. Rep. No. 93-1453, p. 5 (1974) — does not depend upon whether or not the judge actually knew the facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew. (footnote omitted).

108 S.Ct. at 2202.

Similarly, in the Appellants' case, Chief Judge Wald's impartiality was, and is, questioned. Rather than the public confidence being promoted, it is eroded.

The Supreme Court found at least four facts in *Liljeberg* that might reasonably cause an objective observer to question Judge Collins' impartialilty. 108 S.Ct. at 2205. Of these four fact patterns, a similar parallel can be drawn to the Appellants' case.

Justice Stevens wrote:

> Second, it is an unfortunate coincidence that although the judge regularly attended the meeting of the Board of Trustees, he was not present at the January 28, 1982, meeting a week after the 2-day trial and while the case was still under advisement. The minutes of that meeting record that representatives

> of the University monitored the progress of the trial, *but did not see fit to call to the judge's attention the obvious conflict of interest* that resulted from having a University trustee preside over that trial.

Similarly, in this case, the appearances are that Attorney Kolker knew of Chief Judge Wald's interest. However, Kolker did "not see fit to call to the attention" of Chief Judge Wald the obvious conflict of interest that resulted from Mr. Wald's participation in O.P. and Chief Judge Wald's participation in the Order.

Attorney Kolker's failure to disclose this transaction with Mr. Wald was the result of a business decision.

Mr. Kolker most certainly knew of Chief Judge Wald's interest. He did not bring the obvious conflict to the court's attention. Unlike the University representatives which Justice Stevens criticized, he is an officer of the court and should be held to a ***higher standard***. Apparently, monied interests got in the way.

It is absurd to think that the Walds did not discuss the partnership. It is one of their largest assets with the value listed at $50,000-$100,000. There is, of course, the natural assumption that brothers enjoy a close personal and family relationship. The judges of the Seventh Circuit agree with us. *See SCA Services, Inc. v. Morgan, supra*. This certainly would extend to husband and wife even more so.

The evidence of "notice" in the instant matter is much more overwhelming that in *Liljeberg* with the submissions of the partnership papers by Kolker, Chief Judge Wald's knowledge of them, and Appellants' Docketing Statement which identified Mr. Kolker and his firm.

In *Liljeberg*, Judge Collins was a trustee of Loyola University. It was a fiduciary relationship which Judge Collins had

with Loyola. In this matter, it was Chief Judge Wald's *personal financial* relationship. All of the potential notices would be "notice" to Chief Judge Wald under *Liljeberg*. Chief Judge Wald simply hade an absolute and unequivocal duty to know what her husband had. This is demanded by landmark *Liljeberg*. In fact, Chief Judge Wald knew, she revealed it in her Financial Disclosure Report.

In the third fact pattern, Justice Stevens found:

> Third, it is remarkable — and quite inexcusable — that Judge Collins failed to recuse himself on March 24, 1982. A full disclosure at that time wold have completely removed any basis for questioning the Judge's impartiality and would have made it possible for a different judge to decide whether the interests — and appearance — of justice would have been served by a retrial. Another 2-day evidentiary hearing would surely have been less burdensome and less embarrassing than the protracted proceeding that resulted from Judge Collins' nonrecusal and nondisclosure. Moreover, as the Court of Appeals correctly noted, Judge Collins' failure to disqualify himself on March 24, 1982, also constituted a violation of Section 455(b)(4), which disqualifies a judge if he "knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party of the proceeding, or any other interest that could be substantially affected by the outcome of the proceedings." This separate violation of Section 455 further compels the conclusion that vacatur was an appropriate remedy; by his silence, Judge Collins deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal.
>
> Fourth, when respondent filed its motion to vacate, Judge Collins gave three reasons for denying the mo-

> tion, but still did not acknowledge that he had known about the University's interest both shortly before and shortly after the trial. Nor did he indicate any awareness of a duty to recuse himself in March of 1982.
>
> These facts create precisely the kind of appearance of impropriety that Section 455(a) was intended to prevent. The violation is ***neither insubstantial nor excusable.*** Although Judge Collins did not know of his fiduciary interest in the litigation, he ***certainly should have known. In fact, his failure to stay informed of this fiduciary interest, may well constitute a separate violation of Section 455.*** See Section 455(c). Moreover, providing relief in case such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce Section 455 ***may prevent a substantive injustice*** in some future case by encouraging a judge ***or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.*** It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment.

(Footnotes omitted). 108 S. Ct. at 2205, 220b.

Such a fact pattern as is presented with Chief Judge Wald creates precisely the kind of appearance of impropriety that §455(a) was intended to prevent. Chief Judge Wald's violation is neither insubstantial nor excusable. Although Chief Judge Wald may claim she did not know of the details of the partnership, she most certainly should have known. Chief Judge Wald's failure to stay informed of her husband's holdings may well constitute a separate violation of §455, as Justice Stevens recognized when he wrote:

> In fact, his failure to stay informed of this fiduciary interest, may well constitute a separate violation § 455. See § 455(c).

108 S. Ct. at 2206.

Furthermore, Section 455(b)(4)(c) provides that "A Judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." *Liljeberg* at 2202. A reading of Chief Judge Wald's F.D.R. indicates that the O.P. partnership interest was among the largest family assets. Although Chief Judge Wald states that she and Mr. Wald did not to have known of Naisbitt and Kolker's participation in O.P., a reasonable person would and should question the failure to know of this particular interest and consequently doubt the propriety of Chief Judge Wald's participation in matters to which Mr. Kolker and his client, Trustee Guinee, had a material interest.

In *Liljeberg*, the Supreme Court stated that Judge Collins' impartiality would have been questioned "even though his failure to disqualify himself was the product of a temporary lapse of memory, it was nevertheless a plain violation of the terms of the statute." *Liljeberg* at 2203. Mr. Wald's lack of knowledge, and Chief Judge Wald's consequent lack of knowledge, do not waive the requirement of disqualification when the appearance conflict exists, nor does it purify the resulting tainted Order.

The Due Process rights and substantial property rights of these Appellants can be protected in this case only if they are afforded a level playing field on which to litigate the issues. The Supreme Court in its landmark *Liljeberg* decision affords these Appellants a vehicle for insuring that they will receive the benefit of an impartial judiciary that the Constitution guarantees.

B. The Order of June 9, 1989 Fails To Comport With The Decisions Of The District Of Columbia Court Of Appeals And The Other Circuits. . . .

The decision of the District of Columbia Court of Appeals in the instant case conflicts with the ruling in other Federal Circuits this issue of judge disqualification.

In *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) the Eleventh Circuit held that Section 455(a) "embodies an objective standard." The court further deemed that the perceptions of conflict by the "disinterested lay observer" is the litmus test for such an issue. *Id.*

The Fifth Circuit, in in its decision that was later upheld by the Supreme Court in *Liljeberg*, reasoned:

> it makes no difference how much practical effect such action would have had on the outcome of the litigation. The purpose of the disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same anyway.

Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), *aff'd*, 108 S.Ct. 2194 (1988).

The Fifth Circuit later ruled that a judge was disqualified, even though there was no evidence whatsoever of actual bias, because the "view of the average, reasonable person is the standard for analysis as to whether a judge shall disqualify himself or herself." *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988). The Faulkner opinion went on to state the following, including a quote from *Liljeberg*:

> . . . although the view of the "reasonable person may not always be fair or even accurate, it is still

> the standard that must be applied: "[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of the judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (quoting *Liljeberg* at 2204-05)

An additional reason for granting the writ is found in the way the issue of recusal based on the doctrines and teachings of the *Liljeberg* case between the U.S. Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the District of Columbia. Both are courts of last resort in the District of Columbia.

Rule 17 of the Rules of the Supreme Court under subsection 1(b) calls as a reason for granting the writ: (b) when a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or a federal court of appeals.

Petitioner here submits that the exact situation referred to in Rule 17 exists here. The local court in *Monroe W. Scott v. United States* (Nos. 85-206 & 86-423 decided on May 10, 1989) applied the rules established in *Liljeberg* to reverse a criminal conviction because the trial judge was seeking employment with the Justice Department who was prosecuting the defendant through the US attorney's office.

The Court there stated (p. 22)

"That Scott does not claim that his trial was unfair or that Judge Murphy was actually biased against him is not dispositive of the factors deemed by the Supreme Court as significant in determining that *Liljeberg* was an appropriate case in which to apply a retroactive remedy are present here."

Contrasted with the holding in the Federal Circuit in Mr. Brown's case wherein the pleading was deemed frivolous and

summarily offered the clear contrasting application of this Court's holding calls for the writ to be granted.

In a concurring opinion, Associate Justice Schwelb stated that the members of the District of Columbia Court of Appeals had to "grit their teeth" in passing on allegations that Judge Murphy had violated ethical standards. He went on to state that the appearance of partiality could not be characterized as harmless error except in the rarest instance.

The United States Court of Appeals should have followed the difficult, but just, path taken by the District of Columbia Court of Appeals and defended the Petitioners' precious rights.

CONCLUSION

For the above and foregoing reasons, petitioners respectfully submits that the Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

Philip J. Brown *(pro se)*
2613 P Street, N.W.
Washington, D.C. 20007

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7020 **September Term, 1988**
CA 86-00474

1250 Twenty-Fourth Street Associates
Limited Partnership, et al.

v.

Philip J. Brown, et al.
Appellants

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. GInsburg and Sentelle, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that appellants' suggestion is denied, and, upon further consideration of the suggestion and of the order of April 5, 1989, it is

FURTHER ORDERED, By the Court *en banc*, on its own motion, that the Clerk is directed to refer the aforesaid suggestion to the Court's Committee on Admissions and Grievance (Committee) and to the Bar Counsel for the District

of Columbia, to be considered in the proceedings initiated by the order of April 5, 1989.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald did not participate in the decision to refer the suggestion to the Committee and Bar counsel.

Circuit Judges Ruth B. Ginsburg and D.H. Ginsburg did not participate in this matter.

United States Court of Appeals
For the District of Columbia Circuit
FILED JUN 09 1989
CONSTANCE L. DUPRE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7020 **September Term, 1988**
CA 86-00474

1250 Twenty-Fourth Street Associates
Limited Partnership, et al.

v.

Philip J. Brown, et al.
Appellants

BEFORE: Wald, Chief Judge*; Mikva, and Edwards, Circuit Judges

ORDER

Upon consideration of appellants' motion to recall mandate, motion for leave to file motion in excess of twenty pages, the motion to vacate order and the oppositions thereto, it is

ORDERED that the motions be denied. Almost eight months after this appeal has been decided, appellants attempt to reopen their case by raising a totally frivolous allegation of "appearance of impropriety" on the part of a member of the panel. Appellants' argument concerning the alleged conflict of interest is irresponsible. In view of the abusive nature of these filings and in view of appellants' frequent use of this tactic, further inquiry is appropriate. It is, therefore,

*A statement by Chief Judge Wald is attached. Chief Judge Wald did not participate in the decision to refer this matter to the appropriate authorities.

FURTHER ORDERED that the conduct of Charles A. Kubinski, appellants' counsel, in this matter be referred to the Court's Committee on Admissions and Grievances and to the Office of Bar Counsel for the District of Columbia.

The Clerk is directed to mail a copy of this order both to appellants and to Charles A. Kubinski, 2613 P Street, N.WS., Washington, D.C. 20007.

Per Curiam

FOR THE COURT:
Constance L. Dupre
Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
FILED APR 05 1989
CONSTANCE L. DUPRE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986
CA No. 86-00474

No. 86-7007

FILED: February 17, 1987

1250 Twenty-Fourth Street
Associates, et al.

v.

Philip J. Brown, et al.

BEFORE: RUTH B. GINSBURG, WILLIAMS and
D.H. GINSBURG, Circuit Judges

O R D E R

Upon consideration of appellants' petition for reconsideration, filed January 14, 1987, it is

ORDERED, by the Court, that the petition is denied without prejudice to appellants' right to move in the district court for relief from the judgment on grounds of newly discovered evidence, Fed. R. Civ. P. 60(b).

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 86-0747
PHILIP J. BROWN, *et al.*,	)	
Defendants	)	

MEMORANDUM ORDER

Before us is defendants'[1] Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b)(2). We have previously considered this case on several occasions and will not recite again the detailed background of the present action. *See* Memorandum Opinion of April 28, 1986 and May 13, 1986. A brief review of the chronology is all that is necessary. On May 13, 1986 we issued an order 1) denying defendants' motion for permission to issue a third notice of default; (2) granting plaintiffs' motion for summary judgment with regard to all counts of the complaint and counterclaim; 3) declaring defendants' notices of default Nos. 1, 2 & 3 invalid and without merit; and 4) permanently enjoining defendants and their representatives from issuing any notice of default under the Ground Lease without first obtaining the approval of this court, until plaintiffs obtained permanent financing for the development and construction of the 1250 24th Street project.

[1]The term "defendants" in this opinion shall hereinafter refer only to the debtor-defendants.

On May 23, 1986 defendants moved for reconsideration of our May 13, 1986 order. We denied this motion. Defendants subsequently appeal portions of our decision, and on December 15, 1986 the United States Court of Appeals for the District of Columbia Circuit summarily affirmed. On Janary 14, 1987 the defendants filed a petition for reconsideration of the Court of Appeals' decision. That petition was denied on Feburary 1, 1987. On May 12, 1987, almost one year after we had issued our May 13, 1986 order, and more than three months after the Appellate Court's most recent denial, defendants filed this Fed. R. Civ. P. 60(b)(2) motion for relief from judgment. After careful consideration of the briefs filed by the parties and the record as a whole, we deny defendants' motion for the reasons stated below.

Discussion

Defendants asserted that Philip Brown's signature on the First Amendment to the Ground Lease ("First Amendment") is a forgery, and that the document submitted to this court for its consideration in this litigation shows signs of alteration, and contains a false notarial signature. We find that, even assuming *arguendo* that defendants' assertions are true,[2] denial of this motion is appropriate.

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[2]We find it unnecessary to address whether defendants' assertions are true, because we find that defendants' allegations of forgery are irrelevant as a legal matter. The authenticity of Philip Brown's signature has no bearing on the validity or enforceability of the First Amendment. On December 22, 1981 the defendants filed for protection under Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Court appointed a Trustee to manage the defendants' property on July 22, 1982. On January 10, 1984 the Bankruptcy Court confirmed the Trustee's Amended Plan of Arrangement, including the Ground Lease and the First Amendment, and ordered the Trustee to ratify and execute a series of agreements, including the First Amendment. On October 11, 1984, the Trustee executed a Certificate of Ratification. The Trustee was the only person with

A district court may in its discretion relieve a party from final judgment, order or proceeding pursuant to Fed. R. Civ. P. 60(b)(2) when the party establishes the existence of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The Rule requires that such motions be made "within a reasonable time", but in no case later than one year after judgment. Upon examination of these factors, we find that 1) the evidence in question, if it exists, *could have* been discovered and presented to this court far earlier had defendants exercised due diligence and 2) that defendants failed to file this motion within a "reasonable" period of time after the issuance of our order. We emphasize that each of these findings would be in and of itself sufficient to support our decision in this matter.

A. Due Diligence

We find that defendants failed to exercise due diligence in their discovery of the alleged forgery, document alteration and false notarial signature. The moving party bears the burden of showing why it did not discover and present the evidence in question prior to the court's disposition of the matter. *See* 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil §2859, at 184-85 (1973), and cases cited therein. Defendants have failed to demonstrate why they *could not* have

---

the legal authority to enter into the Ground Lease and First Amendment on behalf of the defendants. While defendants challenge the validity of the Trustee's ratification, we find no merit in these arguments. The Trustee has indicated that his signature on the document is authentic, and that he intended to ratify the First Amendment thereby. Defendants' Reply Memorandum in Support of Motion for Relief from Judgment, Ex. P. (Trustee Affidavit). We find no evidence that the Trustee relied on the presence of Philip Brown's signature in deciding to sign himself. In Addition, the Trustee has reaffirmed his signature. Trustee Response to Def. Motion for Relief from judgment, at 1.

discovered the evidence in question by the exercise of due diligence. In fact, defendants "discovered" the alleged irregularities in the First Amendment by having Philip Brown and several document experts examine the very same document which had been in their possession during the course of this litigation. Defendants' Memorandum in Support of Motion for Relief from Judgment ("Def. Memo.") at 6. Evidence, in the possession of a party *before* judgment is rendered is logically *not* "newly discovered" evidence within the meaning of the Rule. *See* 11 C. Wright and A. Miller, *supra*, §2859, at 182-83. In any case, defendants clearly had the *ability* to discover the alleged defects in the document long before our judgment.

We also find that defendants demonstrated a lack of diligence in their failure to investigate the validity of the documents once various factors presented themselves. The First Amendment was the focus of attention throughout the course of this litigation. If, as defendants contend the terms of the First Amendment which Philip Brown actually signed varied from those in the document presented to this court in such a way as to possibly affect the outcome of this litigation,[3] a diligent party would have noted the contrast in terms, or unexplained discrepencies [sic] in interpretation, and examined the document to ensure its validity.

In any case, defendants should have questioned the validity of the document immediately following *our* May 13, 1986

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[3]The movant bears the burden in the Fed. R. Civ. p. 60(b)(2) context of establishing that the "newly discovered evidence changes the factural picture of a case to such an extent that, under the applicable legal principles, the district court would likely reach a different result." *Washington Mobilization Committee v. Jefferson*, 617 F.2d 848, 580 (D.C. Cir. 1980). Defendants assert that consideration of the "newly discovered" evidence presented would likely alter our decision. We have severe doubts. but express no opinion on this matter at this time.-

order, if not before. Defendants, in what appears to be a virtual admission of their lack of due diligence, asert that they were not on notice of the defects in the document until they read the Court of Appeals decision of December 15, 1986, nothing that "defendants [did] not deny having read and initialed each page" of the First Amendment. This, they assert, triggered Philip Brown's inquiry into the validity of the document. The language in our decision *six months earlier* should have triggered similar concerns. In that order we noted that "[d]efendants had a duty to read the contract, and [that] their initials on each page indicate[d] that they [had done so]." Memorandum Opinion of May 13, 1986 at 12. Phillip Brown's failure to pursue this matter following the entry of *our* decision clerly demonstrates a lack of due diligence regarding the discovery of the evidence in question. But this is not the only defect which undermines defendants' motion for relief from judgment.

B. **Reasonable Time**

A Fed. R. Civ. P. 60(b)(2) motion *must* be denied as untimely if it is filed more than one year after judgment. *Ackerman v. U.S.*, 340 U.S. 193, 197 (1950); Goland v. CIA, 607 V.2d 339, (D.C. Cir. 1978). It must be filed within a reasonable time and not more than one year after judgment. While this motion was filed several days before the absolute deadline, we note that the one year time period reflects the "extreme limit" within which a party may file a motion for relief from judgment based on the existence of newly discovered evidence.

We issued the order from which defendants seek relief on May 13, 1986. Defendants filed this motion on May 12, 1987. We find that defendants failed to present a valid justification for their delay in filing, and that in light of all the facts, defen-

dants did not file this motion within a reasonable period of time following our order.

As noted, defendants should have been aware of the alleged irregularities in the document since at least as early as May 13, 1986, when we issued our order. Even assuming, however, that the defendants' late discovery of the alleged defects in the document in December 1986 was excusable, defendants failed to file this motion until May 12, 1987. Thus it was filed over three months after the Court of AppeaLs issued its February 1, 1987 order denying defendants' motion for reconsideration without prejudice to their right to move in this court for relief from judgment under Fed. R. Civ. P. 60(b)(2).[4] Defendants present no explanation for their more than three month delay in filing. We find that this delay is sufficient reason alone to find that defendants failed to file this motion within a reasonable time of our initial decision.

Fed. R. Civ. P. 60(b)(2) is designed to "preserve the delicate balance between the sanctity of final judgments. . . and the incessant command of the court's conscience that justice be done. . . ." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980). The one year limitation regarding the filing of Fed. R. Civ. P. 60(b)(2) motions reflects a policy embodied in the Rule that after one year concerns regarding the finality of judgment *absolutely* outweigh other concerns arising from the existence of newly discovered evidence. While this motion was filed barely within the one year time period, concerns for the sanctity of final judgments likewise weigh heavily here, where many parties have come to rely on our judgment, Plaintiffs' Memorandum in Opposition to Def.

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[4]We note that the Court of Appeals did not *decide* that defendants had identified newly discovered evidence, as defendants assert, Def. Reply at 23, but rather than defendants' were free to file a Fed. R. Civ. P. 60(b)(2) motion if they were so inclined.

Motion for Relief from Judgment, at 11, and where defendants have failed to demonstrate that they exercised due diligence in discovering the defects of the document *within their possession* prior to our judgment, and that they acted within a reasonable period of time after their "discovery" of this evidence, even assuming that their December discovery was excusable.

Accordingly, it is by the court his 18th day of November, 1987,

ORDERED that defendants' Fed. R. Civ. P. 60(b)(2) motion for relief from judgment is denied.

/s/ JOHN H. PRATT
JOHN H. PRATT
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987
C.A. No. 86-00474

No. 88-7020

FILED: June 28, 1988

1250 Twenty-Fourth Street
Associates Limited Partnership,
et al.

v.

Philip J. Brown, et al.,
Appellants

BEFORE: Wald, Chief Judge; Mikva and
Edwards, Circuit Judges

ORDER

Upon consideration of appellees' motion for summary affirmance, the initial and supplemental oppositions thereto, and the reply, it is

ORDERED by the court that appellees' motion for summary affirmance be granted substantially for the reasons stated in the district court's memorandum filed November 18, 1987.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

No. 89-384 (2)

FILED
OCT 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PHILIP J. BROWN, *et al.*,
Petitioners,

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL J. KIERNAN
DUNNELLS, DUVALL, BENNETT
& PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1022
Counsel for Respondents 1250 Twenty-Fourth Street Associates Limited Partnership and J. W. Kaempfer, Jr., its general partner

Of Counsel:
RICHARD O. DUVALL
DUNNELLS, DUVALL, BENNETT
& PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1420

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-384

PHILIP J. BROWN, *et al.*,
Petitioners,

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents 1250 Twenty-Fourth Street Associates Limited Partnership and J. W. Kaempfer, Jr., its general partner (hereafter "Associates"), respectfully pray that the Court deny the Petition for Writ of Certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit entered on June 9, 1989.

STATEMENT OF THE CASE

Petitioner Philip J. Brown [1] seeks review of a decision by the Court of Appeals refusing to vacate an order of the Court entered a year earlier. Mr. Brown's allegations that the Circuit Chief Judge had a "conflict of interest" requiring her recusal were rejected by the Court as factually unfounded and totally frivolous.

Mr. Brown, along with William J. Brown and B&W Management, Inc. (collectively "the Browns") are debtors in pending Chapter 11 bankruptcy cases in the United States Bankruptcy Court for the District of Columbia (Nos. 81-00698, 81-00700, 81-00701). Following a court-appointed examiner's report, a Trustee was appointed for the three bankruptcy estates in July 1982.

On November 8, 1983, the Trustee filed an amended plan of arrangement. The centerpiece of this plan was a 99-year ground lease of property located at 1250 24th Street, N.W., Washington, D.C. (the "Ground Lease") between The Kaempfer Company (Associates' predecessor in interest), as lessee and the Browns as landlord. On December 23, 1983, the parties executed a first amendment to the Ground Lease (the "First Amendment") which provided that the tenant could seek a favorable rezoning of the leased property and, if successful, would be partially reimbursed for its costs by the landlord.

On January 10, 1984, the Bankruptcy Court confirmed the Trustee's amended plan of arrangement and directed the Trustee to execute on behalf of the bankruptcy estates the Ground Lease as amended by the First Amendment.

---

[1] Mr. Brown filed the Petition for Writ of Certiorari as a *pro se* litigant. William J. Brown, who is allied with Mr. Brown and who was party to the proceedings below, is sometimes identified in Mr. Brown's Petition as a petitioner. However, William Brown has not signed the Petition as a *pro se* litigant and has not appeared through counsel. Respondents therefore assume that William Brown is not a petitioner in this proceeding.

The Browns appealed the Bankruptcy Court order, but the order was affirmed by the District Court in July 1984.

Disputes arose between the Browns and Associates in January 1986. The Browns served on Associates default notices under the Ground Lease and disputed the calculation of ground rent under the formulas set forth in the Ground Lease and the First Amendment. Associates filed an adversary proceeding seeking a declaration that the two default notices were invalid, a declaration that the rent formulas of the Ground Lease and First Amendment governed the calculation of rent, and an injunction to prohibit the Browns from issuing any future default notices without prior determination from the Court that the proposed default notice is filed in good faith and is not frivolous. The Browns filed an eight-count counterclaim alleging, *inter alia*, that the rent formulas in the Ground Lease and the First Amendment should be set aside on grounds of fraud.

On May 13, 1986, District Court Judge John H. Pratt issued a Memorandum Opinion granting Associates its requested relief and denying and dismissing each of the Browns' claims. Judge Pratt held that the rent formulas in the Ground Lease and the First Amendment were unambiguous and could not be set aside on the grounds of fraud because (i) such allegations were time-barred under 11 U.S.C. § 1144, and (ii) the allegations were insufficient as a matter of law since the Browns had a duty to read the documents, and the Browns had executed the documents.

The Browns appealed that portion of the District Court's order relating to the validity of the Ground Lease and First Amendment. On December 15, 1986, the Court of Appeals summarily affirmed the District Court (D.C. Cir. No. 86-7007).

On or about January 14, 1987, the Browns filed a petition for reconsideration in the Court of Appeals. For the

first time in these proceedings, the Browns alleged that one of the signatures of Philip J. Brown on the First Amendment was a forgery. Significantly, the alleged forgery was a signature witnessed by Nicholas A. Addams, Esq., the Browns' attorney. On February 17, 1987, the D.C. Circuit denied the petition for reconsideration without prejudice to the Browns' right to file a motion for relief from judgment pursuant to Rule 60(b).

Three months later, on May 12, 1987, the Browns filed a Rule 60(b) motion with the District Court. Following full briefing, the District Court denied the motion in a Memorandum Order filed November 18, 1987. The District Court held that the allegations of forgery were irrelevant as a legal matter since the authenticity of Philip J. Brown's signature had no bearing on the validity and enforceability of the First Amendment, since the Trustee, who had the sole authority to execute the documents on behalf of the bankruptcy estates, knowingly ratified the First Amendment. The District Court further held that the Rule 60(b) motion must be denied because the Browns failed to demonstrate why they could not have discovered the evidence before judgment. The District Court also found that the Browns' unexplained failure to pursue the alleged forgery issue immediately after the District Court's May 13, 1986 opinion was "a virtual admission of their lack of due diligence." As an alternatively sufficient ground to deny the Rule 60(b) motion, the District Court found that the Browns failed to file the motion within a reasonable time, even assuming that their late discovery of the "forgery" was excusable.

On June 28, 1988, the Court of Appeals (Wald, C. J., Mikva and Edwards, JJ.) granted Associates' motion for summary affirmance of the November 18, 1987 order (D.C. Cir. No. 88-7020). The Browns filed a petition for writ of *certiorari* on September 26, 1988. The Court denied the petition on November 14, 1988. *Brown v. 1250*

Twenty-Fourth Street Associates Limited Partnership, —— U.S. ——, 109 S.Ct. 393 (1988).[2]

Four months after this Court denied *certiorari*, the Browns filed with the Court of Appeals a motion to recall mandate and a motion to vacate the June 28, 1988 order summarily affirming the District Court. The Browns alleged: "Just recently, the Appellants discovered that Chief Judge Wald's husband, Robert Wald, was, in what tends to show, involved in a business transaction with the counsel for the Appellants' bankruptcy trustee." The Browns alleged that the "conflict of interest" mandated vacating the summary affirmance order.

The Browns' central allegation was that Mr. Wald had purchased an interest in a limited partnership in December 1985 and that Mr. John H. Naisbitt had withdrawn from the same limited partnership in December 1985. Mr. Naisbitt was represented in the transaction by Peter R. Kolker, Esq., as attorney-in-fact. Mr. Kolker serves as counsel to the Browns' bankruptcy Trustee. The Browns concluded: "It appears Mr. Wald brought [*sic*] Mr. Naisbitt's interest through Kolker."

On April 5, 1989, the Court of Appeals denied the motions to recall and vacate the summary affirmance order, writing, in part:

> Almost eight months after this appeal has been decided, appellants attempt to reopen their case by raising a totally frivolous allegation of "appearance of impropriety" on the part of a member of the panel. Appellants' argument concerning the alleged conflict of interest is irresponsible. In view of the abusive nature of these filings and in view of appellants' frequent use of this tactic, further inquiry is appropriate.

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[2] Petitioner's Statement of the Case made no reference to the fact that this Court denied *certiorari* in his initial appeal from the Court of Appeals decision on the merits of the Rule 60(b) claim.

The Court directed the conduct of the Browns' counsel to the appropriate disciplinary authorities. (Appendix 1a-2a).

Attached to the Court's April 5, 1989 Order was a Statement of Chief Judge Wald.[3] (Appendix 3a-5a). In the Statement, Chief Judge Wald explained, in part:

> The motions and voluminous supporting papers are replete with untruths, misrepresentations, inaccuracies, and irrelevancies. I address myself only to the central allegations of the motions.
>
> My husband has never had business dealings with Mr. Kolker or Mr. Naisbitt directly or indirectly, did not directly or indirectly purchase Mr. Naisbitt's interest in a real estate limited partnership, or any part of it through Mr. Kolker, and did not then know, and did not learn until the filing of these motions, of any involvement or participation of Mr. Naisbitt or Mr. Kolker in the real estate partnership.
>
> . . . .
>
> I could not have known of a sale through Mr. Kolker of his client's interest in the partnership to my husband, nor of a purchase through Mr. Kolker by my husband of Mr. Kolker's client's interest, since no such sale or purchase ever occurred. They are a total fiction.

Undaunted, the Browns filed with the full Court of Appeals a suggestion for *en banc* consideration of their motion to vacate the summary affirmance order. On June 9, 1989, the full Court denied the suggestion and, on its own motion, referred the suggestion for *en banc* consideration to the disciplinary authorities to be considered in the proceedings initiated by the Court's order of April 5, 1989. (Appendix 6a-7a).

Philip Brown filed a Petition for Writ of Certiorari on or about September 7, 1989.

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[3] Mr. Brown did not include this attached Statement in the appendix to his Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals acted well within its authority and its discretion in refusing to reopen a long-settled matter when the Browns alleged that there was a "conflict of interest" which was factually untrue. Moreover, the Court did not deny Mr. Brown any due process rights in referring his attorney to disciplinary authorities in view of the Browns' repeated use of the recusal "tactic" in litigation and in the face of allegations which were "irresponsible," "totally frivolous," and "abusive." Mr. Brown does not have a due process right to concoct fictitious "conflicts of interest."

REASONS FOR DENYING THE WRIT

The Court of Appeals Properly Refused to Vacate Its June 1988 Order When the Petitioner Presented Only Insufficient and Unsupported Allegations of "Conflict of Interest."

The Petition seeks review of a decision by the Court of Appeals refusing to reopen a matter it had passed on nearly a year before. It is not a denial of any legitimate rights of Mr. Brown when the Court of Appeals declines to vacate the decision of a three-judge panel after denial of *certiorari* by this Court. Because there are no questions important enough to warrant review and because the decision below clearly comports with existing law, the Petition should be denied.

Mr. Brown incorrectly reads this Court's decision in *Liljeberg v. Health Services Acquisition Corporation*, —— U.S. ——, 108 S.Ct. 2194 (1988), as obviating any factual basis for a judicial disqualification motion. Certainly the Court did not hold in *Liljeberg* that disqualification was appropriate whenever a *party* felt there might be an "appearance of impropriety"—particularly when the "facts" supporting the allegation of impropriety are determined by the judge to be a "total fiction." Mr.

Brown's interpretation of *Liljeberg* would require disqualification of judges and vacation of orders regardless of the truth of the allegations of conflict of interest.

Even if Mr. Brown had alleged factual circumstances sufficient to raise an "appearance of impropriety" regarding Chief Judge Wald's participation, *Liljeberg* does not mandate vacating the summary affirmance order. Rather, as the Court stated in *Liljeberg*, the remedy for a violation of 28 U.S.C. § 455 must take into account the status of the case and whether parties have come to rely upon the Court's order. —— U.S. at ——, 108 S.Ct. at 2204. The Court of Appeals was not required to vacate a decision even if Mr. Brown had raised a genuine violation of 28 U.S.C. § 455.

Moreover, the challenged order was entered by a unanimous three-judge panel. Even if Chief Judge Wald should not have sat on the case, her retroactive recusal would not affect the integrity of the order. *See, e.g., Hodosh v. Block Drug Co., Inc.*, 790 F.2d 880, 881-82 (Fed. Cir.), *cert. denied*, 479 U.S. 827 (1986) (referring to "erroneous assumption that a unanimous decision must be vacated when one member of a panel learns of a basis for his disqualification after the decision has been handed down."); *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (if recusal had been appropriate, and it was not, two remaining Circuit Judges were at liberty to decide appeal and would approve the opinion as issued).

Finally, the Court of Appeals' referral of Mr. Brown's counsel to disciplinary authorities was an appropriate exercise of the Court's inherent authority over members of its Bar. The Court properly took notice of Mr. Brown's repeated use of judicial disqualification and recusal motions. Indeed, the Browns' tactical use of these motions is without parallel: Since January 1986, in the litigation matters between the Browns and Associates, the Browns have filed three motions to recuse Bankruptcy Judge Bostetter, seven motions to recuse District Court

Judge Pratt, as well as recusal requests or motions directed at District Court Judges Johnson, Oberdorfer, and Green. The Browns also moved to disqualify Circuit Judge Ruth Bader Ginsburg in a related matter, also pending before this Court. *Brown v. 1250 Twenty-Fourth Street Associates Limited Partnership*, No. 89-392, petition for *certiorari* filed September 7, 1989. All of these efforts to recuse or disqualify judges have been denied. The Court of Appeals was fully justified in determining that the filing of the motion directed at Chief Judge Wald was not only factually insufficient, but was also part of a tactical use of recusals warranting inquiry by disciplinary authorities.

CONCLUSION

Petitioner has failed to establish any grounds for the granting of a writ of *certiorari*. The Court of Appeals' orders were in accord with the *Liljeberg* decision and were well within the Court's discretionary control over its own docket and its own Bar. Mr. Brown's attempt to concoct a "conflict of interest" was determined to be factually inaccurate and legally insufficient. Respondents respectfully request that the petition for writ of *certiorari* be denied.

Respectfully submitted,

PAUL J. KIERNAN
DUNNELLS, DUVALL, BENNETT
& PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1022
Counsel for Respondents
1250 Twenty-Fourth Street
Associates Limited Partnership
and J. W. Kaempfer, Jr.,
its general partner

Of Counsel:
RICHARD O. DUVALL
DUNNELLS, DUVALL, BENNETT
& PORTER
2100 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 861-1420

October 11, 1989

APPENDIX

APPENDIX

***Order* and *Statement of Chief Judge Wald*, filed April 5, 1989**
(U.S. Court of Appeals No. 88-7020)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7020

1250 TWENTY-FOURTH STREET ASSOCIATES,
LIMITED PARTNERSHIP, *et al.*

v.

PHILIP J. BROWN, *et al.*,
Appellants

Before: Wald, Chief Judge*; Mikva and Edwards, Circuit Judges

ORDER

Upon consideration of appellants' motion to recall mandate, motion for leave to file motion in excess of twenty pages, the motion to vacate order and the oppositions thereto, it is

ORDERED that the motions be denied. Almost eight months after this appeal has been decided, appellants attempt to reopen their case by raising a totally frivolous allegation of "appearance of impropriety" on the part

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* A statement by Chief Judge Wald is attached. Chief Judge Wald did not participate in the decision to refer this matter to the appropriate authorities.

of a member of the panel. Appellants' argument concerning the alleged conflict of interest is irresponsible. In view of the abusive nature of these filings and in view of appellants' frequent use of this tactic, further inquiry is appropriate. It is, therefore,

FURTHER ORDERED that the conduct of Charles A. Kubinski, appellants' counsel, in this matter be referred to the Court's Committee on Admissions and Grievances and to the Office of Bar Counsel for the District of Columbia.

The Clerk is directed to mail a copy of this order both to appellants and to Charles A. Kubinski, 2613 P Street, N.W., Washington, D.C. 20007.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
DEPUTY CLERK

Statement of Chief Judge Wald

Motions have been filed by appellants to recall the mandate and vacate the order of June 28, 1988 in this matter on grounds that my husband was involved in a business transaction with the counsel for appellants' bankruptcy trustee, thus creating a conflict of interest or appearance of impropriety on my part.

It is alleged that my husband in December 1985 purchased for $20,000 a limited interest in a real estate partnership that appreciated to a value between $50,000 and $100,000 by April 1986, that the purchase was made from John Naisbitt, an earlier investor in the limited partnership through his attorney Peter Kolker, that Peter Kolker was also attorney to appellants' trustee in bankruptcy, that my husband's purchase of this limited partnership interest through Mr. Kolker was known to me, and that this circumstance created a conflict of interest or appearance of impropriety at the time I participated in the panel decision in this case requiring my recusal then and vacation of the panel order now.

The motions and voluminous supporting papers are replete with untruths, misrepresentations, inaccuracies, and irrelevancies. I address myself only to the central allegations of the motions.

My husband has never had business dealings with Mr. Kolker or Mr. Naisbitt directly or indirectly, did not directly or indirectly purchase Mr. Naisbitt's interest in a real estate limited partnership, or any part of it through Mr. Kolker, and did not then know, and did not learn until the filing of these motions, of any involvement or participation by Mr. Naisbitt or Mr. Kolker in the real estate partnership.

The purchase of an interest in the real estate partnership on December 31, 1985 was made by my husband in response to a private placement offering by OP Building Limited Partnership, owner of the Olympic Plaza office

complex in Los Angeles. A general partner in OP Building Limited Partnership was Anne Pallie, President of Anne Pallie Ltd., a real estate developer. Ms. Pallie had been a subtenant of my husband's law firm Wald, Harkrader & Ross at 1300—19th Street N.W., Washington, D.C. and a client of my husband's firm at the time OP Building Limited Partnership was formed in June 1985 but at the time of my husband's investment was neither a sub-tenant nor client of his firm.

In October 1985, in an unrelated transaction, Mr. John Naisbitt, through his attorney Peter Kolker, had agreed to purchase an interest in OP Building Limited Partnership. Mr. Naisbitt subsequently withdrew from the partnership on December 18, 1985. Mr. Naisbitt's and Mr. Kolker's prior participation in the partnership was unknown to my husband. Indeed, Mr. Naisbitt was unknown to my husband, as was Mr. Kolker's representation of Mr. Naisbitt.

My husband's dealings were exclusively with the offeror, OP Building Limited Partnership. He neither directly nor indirectly dealt with Mr. Naisbitt or Mr. Kolker. He did not purchase Mr. Naisbitt's interest or any part of it. He has never known Mr. Naisbitt and first learned of his existence through the pleadings filed on these motions March 24, 1989. He knows Mr. Kolker as a fellow member of the District of Columbia Bar.

I could not have known of a sale through Mr. Kolker of his client's interest in the partnership to my husband, nor of a purchase through Mr. Kolker by my husband of Mr. Kolker's client's interest, since no such sale or purchase ever occurred. They are a total fiction.

While it is not directly relevant to the motions, I wish to respond to the charge by appellants that in failing to include in my 1985 Financial Disclosure Report my husband's purchase in December 1985 of a limited interest in the OP Building Limited Partnership, I violated the

Ethics in Government Act. I am advised by my husband's accountant who assisted in the preparation of the report that on December 31, 1985, based on all available information, my husband's interest had a negative net worth, and thus was not an asset subject to reporting under the Financial Disclosure Instructions for Federal Officials and Employees then in effect. In April 1986, pursuant to a subsequent private placement offering, my husband purchased an additional interest in the partnership (renamed OP West/LA Associates) for cash and note in the amount of $63,000. This made his total investment $83,000 which I reported as having a value between $50,000 and $100,000 in my 1986 and subsequent Financial Disclosure Reports.

***Order*, filed June 9, 1989**
(U.S. Court of Appeals No. 88-7020 (*en banc*)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7020

1250 TWENTY-FOURTH STREET ASSOCIATES

LIMITED PARTNERSHIP, *et al.*

v.

PHILIP J. BROWN, *et al.*,
Appellants

Before: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that appellants' suggestion is denied, and, upon further consideration of the suggestion and of the order of April 5, 1989, it is

FURTHER ORDERED, By the Court *en banc*, on its own motion, that the Clerk is directed to refer the aforesaid suggestion to the Court's Committee on Admissions and Grievances (Committee) and to the Bar Counsel for

the District of Columbia, to be considered in the proceedings initiated by the order of April 5, 1989.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald did not participate in the decision to refer the suggestion to the Committee and Bar Counsel.

Circuit Judges Ruth B. Ginsburg and D. H. Ginsburg did not participate in this matter.

Supreme Court, U.S.
FILED
OCT 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

(3)

NO. 89-384

PHILIP J. BROWN, et al.,

Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES
LIMITED PARTNERSHIP, et al.,

Respondents

PETITIONERS' REPLY MEMORANDUM

PHILIP J. BROWN (PRO SE)
2613 P Street, N.W.
Washington, D.C. 20007

TABLE OF AUTHORITIES

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89-384

PHILIP J. BROWN, et al.,

Petitioners

v.

1250 TWENTY-FOURTH STREET ASSOCIATES LIMITED PARTNERSHIP, et al.,

Respondents

PETITIONERS' REPLY MEMORANDUM

Petitioners Philip J. Brown and William J. Brown hereby replies to the Brief In Opposition To Petition For Writ Of Certiorari ("Opposition") of Respondent 1250 Twenty-Fourth Street Associates

Limited Partnership ("Respondent").[1] Petitioners submit that Respondent makes a number of misleading statements as to the facts of this case and misstates the law. The Petitioners hereby submit the following to set the record straight.

ARGUMENT

Respondent states, at page four of its Opposition, that the forgery of Philip J. Brown's signature was witnessed by the Petitioners' former attorney, Nicholas A. Addams. Respondent fails to mention, however, that at the time the forgery was allegedly witnessed, two of its own

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[1] Petitioners admittedly filed the original petition without the signature of William J. Brown. Philip J. Brown did ask for and follow the direction of the Clerk's office and believed at the time that Mr. William J. Brown was properly joined as a Petitioner as he desired. B&W Management, Inc., appellant below, also desired to join as Petitioner but was unable to obtain required counsel due to the chilling effect of the decision below.

partners were trustees on a Deed of Trust on attorney Addams' office building.[2] This fact was hidden from Petitioner both by Mr. Addams and Respondent's agents, and was further obscured when at the time the Deed of Trust was released, the Certificate of Satisfaction noted that the original documents had been lost.[3] Petitioners strongly believe that, in addition to the reasons raised in the instant petition, their rights have been seriously impaired by the fact that their attorney was under the financial dominion of their adversaries. Respondent should not be allowed to deceive this Court as it has Petitioners.

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[2] Respondent also fails to note that Mr. Addams was recently disbarred for misappropriating funds from and lying to a client.

[3] Strangely enough, Petitioners have possession of a copy of the original Deed of Trust documents at the same time Respondent's agents claimed the documents were missing.

Next, Respondent relies heavily on the fact that Petitioners did not raise the issue of Chief Judge Wald's partnership interest for over eight months. Respondent's position ignores the following: The U. S. Court of Appeals issued a per curiam decision on June 28, 1988, and Petitioners filed a petition for writ of certiorari at the end of September, 1988.[4] Certiorari was denied on November 14, 1988. It was only at this point did Petitioners begin to probe into the Financial Disclosure Reports ("FDRs") of the judges of the D.C. Circuit. The time that it took for Petitioners to diligently obtain the partnership documents from the State of California accounts for the most part of their delay in bringing their motion below. Careful review of the complex partnership agreements also took

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[4] Petitioners inadvertently failed to include this fact in their petition as that petition was handled by outside counsel.

some time. Petitioners acted promptly upon receipt and thorough review of those documents. Petitioners should not be deprived of their rights simply because they took sufficient time to uncover the facts upon which this petition and the motions below are based.

Respondents also rely heavily on the statement issued by Chief Judge Wald in connection with the Court of Appeals Order dated April 5, 1989. As a preliminary matter, Petitioners does not believe that the applicable standard of law requires that Chief Judge Wald knew of the interest, but that she should have known. Chief Judge Wald explained in her statement that her failure to report the purchase of the partnership interest on her 1985 FDR was due to the advice of her husband's accountant. After that statement was issued, Petitioners retained an independent accounting expert to review the partnership

agreement and the FDR instructions who determined that the $20,000 purchase made on December 31, 1985 could not have had a negative net worth and should have been reported by the judge. Therefore, Petitioners do not and has not relied on Chief Judge Wald's statement when pursuing the motions below and this petition.

Most importantly, the facts presented by Petitioners are not a "total fiction" as claimed by Respondent and by Chief Judge Wald. The information was gleaned from actual certified documents obtained from the State of California. How Chief Judge Wald and her husband could have been unaware of the documents to which Petitioners had access or failed to notice the glaring presence of Messrs. Kolker and Naisbitt in those papers seems implausible to Petitioners.

Since Mr. Naisbitt never signed any of the O.P. partnership documents, it is

obvious that Mr. Kolker was principally involved. Mr. Kolker is known by Petitioners to be a social acquaintance of Judge Wald. The entire transaction appears to be a means for diverting a valuable asset to the Chief Judge's husband, who was experiencing business difficulties at the time due to the erosion of his law firm. The Wald's realized up to $250,000 or more capital gain.[5]

Lacking the first-hand knowledge that only Mr. Kolker, the Walds and the other members of the O.P. partnership had access to, Petitioners relied only on the actual

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[5] Petitioners base this conclusion on the following: 1) Judge Wald, on her 1988 FDR, filed May 15, 1989, reported that the sale of the O.P. interest brought a capital gain of over $100,000 (no ceiling is placed on this valuation category); 2) The Walds owned a .6% interest in the partnership; 3) The building that was the sole asset of the partnership was assessed at over $45,000,000; 4) The building was sold by the partnership to Japanese investors, who typically pay a premium price for real estate, but in no case would pay less than assessed value, and; 5) .6% of $45,000,000 equals $270,000.

documentation that existed in connection with the O.P. partnership. That documentation provides the basis for Petitioners' claim that the Wald's had to know of Kolker's involvement, as Kolker's name appeared all over the earlier partnership papers to which Mr. Wald expressly agreed to be bound and made hand-written changes specifically excluding his client from the strict penalty provisions of the partnership agreement. The fact of that exceptional treatment alone, despite Chief Judge Wald's insistence to the contrary, creates the distinct impression on the part of Petitioners that the O.P. sale to Naisbitt was a sham, and that Mr. Wald was the intended recipient of part of that interest.

Petitioners also assert it is Respondent who has misread this Court's landmark rulings in Liljeberg v Health Services Acquisition Corp. 108 S.Ct. 2194 and Aetna

Life Insurance Co. v Lavoie, 475 U.S. 813 (1986).

The Liljeberg doctrine does not require absolute proof that a judge was aware of the conflict but rather whether an objective, reasonable person would think that she should have known. Obviously, Chief Judge Wald and her husband should have known of the facts for which she has disclaimed knowledge. Liljeberg stressed that it was appearances to the ordinary, reasonable person which were crucial to judicial inquiry. In the instant case, it clearly appears from the private and complex nature of the very profitable O.P. transactions that Chief Judge Wald would look favorably upon Mr. Kolker and his interests. Since the U.S. Court of Appeals Order of June 28, 1988 confirmed the ratification of an uncontested forgery by Mr. Kolker's client, Petitioners believes that they have been, consciously or

subconsciously, denied their right to impartial adjudication of this case.

Respondent's reliance on Hodosh v Block Drug Co., Inc. 790 F.2d 880 (Fed. Cir.), cert denied, 479 U.S. 827 (1986) and Maier v Orr, 758 F.2d 1578 (Fed. Cir. 1985) is similarly misplaced. This Court's decision in Aetna clearly supersedes those decisions in this case. The June 28, 1988 Order was a unanimous panel decision issued per curiam. The "leading role" standard elucidated in Aetna cannot therefore be applied since the input of each judge cannot be gleaned from the record (the Circuit's Chief Judge would surely have weighty input in any decision). The evaluation advanced by Justice Blackmun in his concurrence should be applied, whereby the violation of the Petitioners' due process rights occurred when Chief Judge Wald participated.

Respondent's statement that the

Petitioners have frequently moved for recusal or disqualification motions omits, significantly, that numerous judges have recused themselves in the proceedings. The Petitioners have been made wary by the many connections between judges and the parties to these proceedings and should not be penalized for circumstances over which they have no control. Also, Petitioners have moved to disqualify Chief Judge Bostetter and Judge Pratt but Respondent has mischaracterized these motions as well. Motions to disqualify Chief Judge Bostetter are currently pending and the seven motions to recuse Judge Pratt were actually two motions filed in a number of different cases over which Judge Pratt was presiding.

Judicial impartiality is a fundamental right under the Constitution. Infringement of this right affects all as it affects one. The issues presented by Petitioners herein address this fundamental concern and

warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, and those contained in their original petition, Petitioners respectfully submit that their Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be issued.

Respectfully submitted,

Philip J. Brown (pro se)
2613 P Street, N.W.
Washington, D.C. 20007